87-829 (1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF HUGH M. WADE

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

This case presents the following questions:

1. WHETHER THE LOWER COURT HAD JURISDICTION IN DISBARMENT PROCEEDING OVER AN INDIVIDUAL WHO DID NOT COME WITHIN SCOPE OF THE JURISDICTIONAL RULE.

2. WHETHER THE LOWER COURT DENIED PETITIONER DUE PROCESS WHEN PETITIONER HAD NO NOTICE OF THE REACH OF DISCIPLINARY JURISDICTION AND WHEN COURT ASSUMED JURISDICTION BY A JUDICIAL EXPANSION OF THE RULE CONFERRING JURISDICTION.

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STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in acutal service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

D.C. Code, Section 11-2501 states in part:

(a) The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion.

D.C. Bar Rule XI, Section 1 states in part:

Section 1. Jurisdiction. Any attorney who engages in the practice of law within the District of Columbia as defined in Rule 46 II-(b) of the General Rules of the Court [exclusive of those persons described in Rule 46 II (b) (4) who are not members of the Bar of the District of Columbia Court of Appeals] is subject to the disiplinary [disciplinary] jurisdiction of this Court and its Board on Professional Responsibility.

D.C.C.A. Rule 49 (b)(3) states: Practice of Law in the District of Columbia

(1) No person shall regularly engage in the practice of law in the District of Columbia or in any manner hold himself/herself out as authorized or qualified to practice law in the District of Columbia unless he/she is an enrolled active member of the Bar.

(2) No person, firm, association, bank or corporation shall, in the District, advise or counsel any person on matters effecting legal rights, or practice....or in any manner avertise that he/she either alone or together with any other person or persons maintains an office for the practice of law in the District of Columbia, without being an enrolled active member of the Bar.

D.C. Bar Rule II Membership, Section 2 Periodic regristration of Attorneys (1) states:

(1) Every attorney who engages in the practice of law within the District of Columbia as defined in Rule 46 II (b) of the General Rules of the Court (exclusive of those persons described in Rule 46 II (b)(4)) shall on or before July 1 of every year file with the Secretary of the Bar a registration statement setting forth his or her (hereinafter referred to for convenience solely in the masculine gender) date of admission to the Bar of this Court, his current residence and office addresses, and such other information as the Court may from time to time direct. In addition to such registration statement, every attorney shall file a supplemental statement with the Secretary of any change in the information previously submitted within 30 days of such change. An attorney who becomes newly subject to these Rules shall file such a registration statement within 3 months thereafter, or by the following July 1, whichever is later.

D.C. Bar Rule XIII Amendment states in part:

Section 1. Amendments of Rules. Proposals for amendment of these Rules may be presented to the Court by (a) petition of the Board of Governors; or (b) petition of the assembly in respect of changes approved by referendum as provided in Rule VII. Hearing upon such a petition will be pursuant to notice in such manner as the Court may direct.

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

IN THE MATTER OF HUGH M. WADE

Petitioner,

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner Hugh M. Wade prays that a writ of certiorari issue to review the judgment of the District of Columbia Cort of Appeals entered in the above entitled case on May 29, 1987.

CITATION TO OPINION BELOW

The opinion of the District of Columbia Court of Appeals which is the subject of this petition is reported in 526 A.2d 936 (D.C. App. 1987) and is reprinted hereto as Appendix A. The District of Columbia Court of Appeals August 18, 1987 order denying Petitioner's Petition For Rehearing En Banc in that court is reprinted hereto as Appendix B.

JURIDICTION

A decree of the Distrct of Columbia Court of Appeals was entered on May 29, 1987 ordering the Petitioner disbarred from the practice of law in the Distrct of Columbia. A Petition For Rehearing En Banc was subsequently filed with that court and, on August 18, 1987, the District of Columbia Court of Appeals denied such petition

and ordered Petitioner disbarred effective 30 days from the date of that order. This Petition is filed within 90 days of that order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

A separate and distinct ground pursuant to which this Court could and should take cognizance of the subject matter herin is that the Petitioner, Hugh M. Wade, is a member of the bar of this Honorable Court. Rule 8 of the Rules of the Supreme Court of the United States provides that any member of its bar who has been disbarred from the practice of law in any state or district will be suspended forthwith from practice before the Supreme Court of the United States with a subsequent opportunity to show good cause as to why he should not be similarly disbarred from this Honorable Court. Upon Petitioner's response to the rule to show cause issued by this Court

pursuant to Rule 8 the Court will enter an appropriate order with respect to disbarment. Although this Court has not taken notice of Petitioner's disbarment from the District of Columbia Court of Appeals, it may do so upon this showing and may consider the brief herein as the showing of good cause by Petitioner as to why he should not be disbarred from the practice before this Court.

STATEMENT OF THE CASE

Following a November 30, 1983 hearing before a Hearing Committee of the District of Columbia Board on Professional Responsibility, and a subsequent recommendation to the District of Columbia Court of Appeals that Petitioner be disbarred for violations of certain Disciplinary Rules as codified in Appendix A of the D.C. Bar

Rules, Petitioner was disbarred by that court on May 29, 1987. Prior to that order of disbarment by the District of Columbia Court of Appeals, Petitioner challenged the authority of the Board on Professional Responsibility and the District of Columbia Court of Appeals right to assume jurisdiction of this matter on the ground that D.C. Bar Rule XI, Section 1, which authorized jurisdiction by the Board on Professional Responsibility and the District of Columbia Court of Appeals over certain members of the D.C. Bar, who engage in the practice of law within the District of Columbia, did not authorize assumption of jurisdiction over Petitioner under the facts of this matter. While maintaining that the findings were unsupported by substantial evidence, Petitioner does not raise those issues of substantial evidence of consideration here. Rather, the only issue presented for this Court's consideration is whether the lower court

erred in concluding that it and the Board on Professional Responsibility had jurisdiction to discipline Petitioner for alleged disciplinary violations.

The disciplinary proceedings which are the subject of this review arose out of a petition by the District of Columbia Bar Counsel alleging various violations of the Code cf Professional Responsibility based upon Petitioner's alleged misconduct in the Commonwealth of Massachusetts. The Board on Professinal Responsibility adopted the findings of the Committee and recommended to the District of Columbia Court of Appeals the disbarment of Petitioner. All of the alleged violations took place in Massachusetts. Indeed, the lower court noted that "[t]he record reveals that all of the conduct complained of occurred in the Commonwealth of Massachusetts, that neither

the complainant (a woman with whom Petitioner has formally had an intimate and extended love affair in the mid to late 1970's), nor the Petitioner were residents of the District of Columbia, and that Petitioner neither maintained a law office nor actively represented clients in the District of Columbia. It is also clear that none of the property alleged to have been misappropriate by Petitioner was located in the District of Columbia." In the matter of Wade, supra, at 938. The District of Columbia Court of Appleals recognized that the basis for the recommendation of disbarment as a sanction were the allegations and findings of misappropriation. In the matter of Wade, 526 A.2d 936, 936 n.4 (D.C. App. 1987). Massachusetts authorities did not find that Petitioner had engaged in any illegal conduct.

The authority by which jurisdiction to discipline persons for alleged professional

misconduct is conferred upon the Board on Professional Responsibility and the District of Columbia Court of Appeals is by D.C. Bar Rule XI, Section 1, which confers jurisdiction over any attorney who engages in the practice of law within the District of Columbia as therein defined. Notwithstanding the limitation of subject matter jurisdiction and an implied acknowledgment that Petitioner was not engaged in the practice of law within the District of Columbia as noted supra, the District of Columbia Court of Appeals, nevertheless, held that the facts of this case require the conclusion that Petitioner intended to be considered, and had held himself out as, an attorney engaged in the practice of law in the District of Columbia within the meaning of Rule XI, Section 1 and that he, therefore, came within the scope of the Board's and the District of Columbia Court of Appeals' disciplinary jurisdiction. The facts

upon which the lower court's holding rest are based upon Petitioner having maintained an "active" status with the D.C. Bar pursuant to the bar membership registration requirements of D.C. Bar Rule II. But, most importantly, at the time of the institution of these disciplinary proceedings, Petitioner was not engaged in the practice of law with the District of Columbia. In fact, the Petitioner has never been engaged in the practice of law prior to or at the time of these proceedings whether in the District of Columbia or otherwide. (Although within the last several months Petitioner has respresented two Equal Employment Opportunity grievants) Petitioner D.C. Bar registration statement reflects that the Petitioner sub-classified himself in the "other" category with respect to those attorneys maintaining an "active" status with the D.C. Bar. This is for the reason that Respondent taught, as opposed to practiced, law.

By holding as it did, the District of Columbia Court of Appeals brought Petitioner within the reach of disciplinary proceedings under circumstances where he had no notice of such a jurisdictional reach and no reason to believe that such proceedings would encompass him. It did so by equating an attorney engaged in the practice of law within the District of Columbia as being synonomous with members of the D.C. Bar. The two are not the same. The lower court's decision has absolutely denied the Petitioner due process of law as guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution. Without notice, he has been brought within the scope of a jurisdictional rule by judicial expansion of the rule conferring jurisdiction.

REASONS FOR GRANTING REVIEW

I. THAT THE LOWER COURT HAD NO JURISDICTION TO DISCIPLINE AN INDIVIDUAL WHO DOES NOT COME WITHIN THE SCOPE OF THE COURT'S OWN RULES OF JURISDICTION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The District of Columbia Board on Professional Responsibility and the District of Columbia Court of Appeals had no jurisdiction to institute or hear disciplinary proceedings against Petitioner pursuant to their own rules and under the facts of the disciplinary proceeding of In the Matter of Wade, 526 A.2d, 936 (D.C.App. 1987)

D.C. Bar Rule XI, Section 1 ("Jurisdiction") confers disciplinary jurisdiction upon the Board of Professional Responsibility of the District of

Columbia and the District of Columbia Court of Appeals over attorneys who are engaged in the practice of law within the District of Columbia. That rule reads:

> "Any attorney who engages in the practice of law within the District of Columbia as defined in Rule 46 II-(b) of the General Rules of the Court [exclusive of those persons described in Rule 46 II (b)(4) who are not members of the bar of the District of Columbia Court of Appeals] is subject to the disciplinary [disciplinary] jurisdiction of this Court and its Board on Professional Responsibility."

D.C. Bar Rule XI, Section 1 (emphasis added) (Note that District of Columbia Court of Appeals Rule 46(b) is now Rule 49(b)(3). The court rule to which D.C. Bar Rule XI, Section 1 refers, now codified as District of Columbia Court of Appeals Rule 49(b)(3), reads as follows:

> THE PRACTICE OF LAW WITHIN THE DISTRICT OF COLUMBIA:

> (3) The practice of law as used in this rule shall include, but is not limited to, appearing for any other person as attorney in any court, or preparing for any other person any deeds, mortgages, contracts, assignments, discharges, leases, trust instruments or any other instruments affecting real or personal property or any interest therein, or any wills, codicils, or any other instruments affecting the disposition of property of decedents' estates, or any pleadings of any kind in any action brought before any court, or preparing or expressing formal opinions or consulting with respect to any of the foregoing or on any ohter matters of law.

Moreover, in the only case wherein the lower court had considered what constituted the practice of law, J.H. Marshall & Associates, Inc. v. Burleson, 313 A.2d 587 (D.C. App. 1973), that court said:

> According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to

> clients, and all action taken for them in matters connected with the law...
>
> [T]he practice of directing an managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to hwat those rights are and as to the legal methods which must be adopted to enforce the, the practicing of giving or furnishing legal advice as to such rights and methods and the practice, as an occuption, of drafting documents by which rights are created modified, surrendered or securred are all aspects of the practice of law...

Id. at 594 (citations omitted). Thus, by reference to its own rule defining those persons who come within the Board on Professional Responsibility's and its disciplinary jurisdiction, as well as by case law defining the practice of law, the lower court has already determined that the words of Rule XI, Section 1 should retain their ordinary meaning. The rule, thus, encompasses only an attorney, thereby defined, who is actually engaged in such activity.

Both D.C. Bar Rule XI, Section 1 and District of Columbia Court of Appeals Rule 49(b)3, as were all the court and bar rules, were promulgated by the District of Columbia Court of Appeals itself by virtue of its rule making authority pursuant to Congressional enactment as codified in 11 D.C. Code, Section 2501 and was narrowly drawn so as to bring only certain of its members within its scope. The District of Columbia Court of Appeals itself recognized that it could have created broader jurisdictional authority than it did without going beyond Congressionally imposed limitations by including all members of the D.C. Bar within its disciplinary jurisdiction but that it did not. Wade, supra at 938. Thus, a person who is not engaged in the practice of law within the District of Columbia and who has read D.C. Bar Rule XI, District of Columbia Court of Appeals

Rule 49 (b) (3), and the only District of Columbia Court of Appeals decision defining what constitutes the practice of law in the District of Columbia must conclude that he or she is not subject to the disciplinary jurisdiction of the District of Columbia Court of Appeals. One tried before an agency is "legally entitled to insist upon observance of its rules." United States v. MacDaniel, 32 U.S. 97 (Pet.) 1, 15.

In the case at bar, neither Petitioner, the complainant, the property which as the subject of the alleged violations or the alleged conduct of the Respondent has any residential, employment, contractual or other connection to the District of Columbia. In fact, all parties were residents of Massachusetts, the alleged conduct which was the basis for these proceedings took place in Massachusetts, and the property which was the subject of Petitioner's alleged conduct was

located in Massachusetts. Most importantly, Petitioner was not actually engaged in the practice of law with the District of Columbia, a fact which the lower court acknowledge at least to the extent of noting that Petitioner did not have any clients in the District of Columbia and that he did not maintain an office in the District of Columbia. Furthermore, no allegation has ever been made or evidence adduced, with respect to Petitioner having ever done any of the kinds of activities within the District of Columbia as enumerated in District of Columbia Court of Appeals Rule 49(b)(3) or in J.H. Marshall & Associates, Inc., supra. Nor could there have been. Thus, by its own terms, Petitioner was not subject to the jurisdiction of the lower court's disciplinary jurisdiction.

II. THE LOWER COURT DENIED PETITIONER DUE PROCESS WHEN IT ASSUMED DISCIPLINARY JURISDICTION OVER PETITIONER BY JUDICIAL EXPANSION OF THE RULE CONFERRING JURISDICTION.

Notwithstanding the apparent clear language of D.C. Bar, Rule XI, Section 1, and notwithstanding the lower court's acknowledgment that Respondent had not actually been engaged in the practice of law within the District of Columbia, the lower court ruled that the Board and itself did have jurisdiction to institute and conduct disciplinary proceedings against Petitioner based solely upon the Respondent having maintained an "active" status with the D.C. Bar pursuant to the bar registration requirements of D.C. Bar Rule II. By so doing the lower court held, for the first time, that maintaining an "active" status bar membership

with the Secretary of the bar under D.C. Bar Rule II, Section 2(a), which simply entitles one so qualified to practice law within the District of Columbia, is tantamount to being engaged in the practice of law within the meaning of D.C. Bar Rule XI, Section 1. The lower court's opinion recognized the distinction between the mere eligibility to practice law and the actual practice of law but concluded that the filing of registration statements classifying himself in the "active" category of bar members constituted the practice of law. Wade, supra at 941. However, Petitioner's D.C. Bar registration statement reflects that Petitioner also sub-classified himself in the "other" category within the "active" classification as noted supra page 9. This was the holding despite the lower court having previously defined the practice law in District of Columbia Court of Appeals Rule

49(b)(3) and in J.H. Marshall & Assoicates, Inc., supra, both of which embrace only the traditional lay sense of what is meant by the practice of law such as the prosecuting and defending claims on behalf of litigants, preparing legal documents, advising clients and the like. In fact, the opinion of the lower court made no reference at all to the District of Columbia Court of Appeals Rule 49(b)(3) to which D.C. Bar Rule XI, Section 1 refers. Further, the lower court cited no legislative history to either D.C. Bar Rule XI or II, or judicial precedent, to support their conclusion that that Rule XI, Section 1 should be interpreted with reference to D.C. Bar Rule II. The jurisdiction of federal courts cannot be expanded by judicial interpretation. American Fire & Casualty Company v. Finn, 341 U.S. 6,17, 95 L Ed 702, 710 (1951) Indeed, judicial precedent to the contrary with respect to this use by the lower court of D.C. Bar Rule II

exists. As noted by Circuit Judge Prettyman when interpreting Rule 75 of the District of Columbia Municipal Court Rules, the forerunner to D.C. Bar Rule II, Rule 75 of the Municipal Court Rules "merely establishe[d] a convenient roll, with a card of identification, so that persons entitled to practice before their Court can be instantly identified." Austin v. The Municipal Court for the District of Columbia, 235 F.2d 836 at 837 (D.C. Cir 1956) (emphasis added). That court went further and stated that the rule "imposes no substantive requirement for the practice of law." Id. Clearly, the lower court's reliance on Petitioner having maintained an "active" status with the D.C. Bar pursuant to the requirements of D.C. Bar Rule II as the basis for concluding that he was engaged in the practive of law within the District of Columbia within the meaning of D.C. Bar Rule XI's jurisdictional requirements was misplaced.

In light of the clear intent that the scope of D.C. Bar Rule XI, Section 1 extended only to attorneys actually engaged in the practice of law within the District of Columbia rather than all members of the D.C. Bar, no notice existed to potentially effected persons that they may come within the reach of the jurisdictional rule even though they did not engage in the practice of law within the District of Columbia. Indeed, that Petitioner did not have notice of the rule's reach as to him was recognized by Rogers, Associate Judge, when she wrote in her concurring opinion,

> "Although this opinion would constitute <u>future</u> notice, I write separately to indicate that I think Rule XI should be <u>amended</u> to incorporate the holding of this opinion...By so amending our Rule, it would be in conformity with the disciplinary procedures in Maryland and Virginia, Rule BVI(a),MD.Code Ann. (1986 Supp.) ("'Attorney' means any person admitted by the Court of Appeals to practice

law."); Va. Sup. Ct. Rules, Part 6, Rule 6: IV, Paragraph 13, 216 Va. 1143 (1976) ("'Attorney' means a member of the Virginia State Bar.")

Wade, supra, at 940 (emphasis added). That, perceived need to both amend the rule to incorportate the holding of the opinion and to give future notice to potentially effected persons via its holding is a recognition that first, the rule, as it stands, does not have the reach that the majority held it to have had and, that secondly, the rule, as it stands, did not give notice to the Petitioner and other similarly situated persons of the reach of the rule.

"A state may not, under the guise of prohibiting professional misconduct, ignore Constitutional rights." National Association for the Advancement of Colored People v. Button, 371 U.S. 415 at 439 (1963). The issue which Petitioner requests this Court to review is

whether the due process of law, as required by the Fifth and Fourteenth Amendments to the United States Constitution, was afforded the Petitioner before a deprivation of his rights took place in order to discipline him for alleged professional misconduct when he had no notice of the reach of the disciplinary jurisdiction and when his challenge to the jurisdiction of the disciplinary authorities was overruled by a judicial expansion of the rule conferring jurisdiction.

This Court has long held that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer." In the Matter of Ruffalo, 390 U.S. 544 at 551, 88 S.Ct. 1222 (1968) (citing Ex Parte Garland, 4 Wall 333, 380, 18 L.Ed. 366, 369; Spevack v. Klein, 385 U.S. 511, 515, 17 L.Ed.2d 574, 577, 87 S.Ct. 625). In reversing the lower court's order of

disbarment because of an absence of fair notice as the reach of the grievance procedure, this Court went further to note that disbarment proceedings are adversary proceedings of a quasi-criminal nature and, accordingly, a respondent is entitled to procedural due process. Ruffalo, supra, U.S. at 551-52. Because these proceedings are quasi-criminal in nature, analogy to criminal law is appropriate. See Reqatos v. Colorado Supreme Court, 746 F.2d. 1429 (10th Cir. 1984). With that rule in mind, as well as the rule of statutory construction that penal statutes are to be strictly construed against the state and in favor of the accused, it follows that such rules of construction are applicable to disciplinary proceedings wherein statutes and rules are to be strictly construed against the prosecuting authority and in favor of the Respondent to a disciplinary proceeding. In regard to such statues, this Court has stated:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence - must necessarily guess at it's meaning and differ as to its application, violates the first essential of due process of law."

Connally v. General Const. Co., 269 U.S. 385 at 391, 46 S. Ct. 126 at 127 (1925)

> "No one may be required a peril of life, liberty or property to speculate as to the meaning of penal statues. All are entitled to be informed as to what the state commands or forbids."

Lanzetta v. New Jersey, 306 U.S. 451 at 453, 59 S. Ct. 618 at 619 (1939).

> "It is not the penalty itself that is invalid but the extraction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

Champlain Refining Co. v. Corporation Comm. of State of Oklanhoma, 286 U.S. 210 at 243, 52 S.Ct. 559 at 568 (1931).

> "It is established that a law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges and jurors free to decide, without any legally

> fixed standards, what is prohibited and what is not in each particular case."

Giaccio v. Pennsylvania, 382 U.S. 399 at 402-03, 86 S.Ct. 518 at 520-21(1966).

Those statements of this Court as to the necessity of the notice requirements of penal statutes, coupled with this Court's decision in Ruffalo reversing the lower court's order of disbarment on due process grounds because of an absence of notice as to the reach of the disbarment proceeding, would appear to make clear that notice as to the jurisdictional reach of desciplinary proceedings is also compelled by the due process clause of the Fifth and Fourteenth Amendments. This is particularly true when, as here, the rule or statute in question fails to give the requisite notice of prohibited or mandated conduct or jurisdictional paramenters because it is written more specifically than it is later construed to mean thereby encompassing

within its scope conduct or persons which should not come within such scope, rather than because the rule or statute is vague or overbroad. The due process violation which has taken place in that circumstance is a judicial expansion of the statute or rule. Just such a circumstance arose in the case of Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964) which was cited in Ruffalo, supra for the proposition that Ruffalo may well have been "lulled into a false sense of security" by specifically written rules which were subsequently determined to emcompass conduct not specifically prohibited. Id. at 551 n.4. In Bouie, this Court reversed the trespass convictions on the ground that the defendants' right to due process had been violated when the state court retroactively expanded a trespass statute to cover the case at hand. The basic unfairness of this action by the state court was

based upon the fact that the state court applied a criminal sanction to what had been non-criminal conduct when it had occurred. More specifically the law under which the defendants were convicted as construed by the state court provided the defendants with no notice that their conduct would be subject to criminal sanctions prior to their engaging in it. The due process problesms wih such a judicial expansion of a statute or rule as best captured in the extensive language of Bouie, supra where this Court wrote:

> "It is true that in the Connally and Lanzetta cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from the vague or overbroad language in the statue itself, and the court concluded that the statute was ' void for vagueness.' The instant case seems distinguishable, since on its face the language of [section] 16-386 of the South Carolina Code was admirably narrow and precise,...
>
> The thrust of the distinction, however, is to produce a potentially greater deprivation

of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes' as in Lanzetta, or to 'guess at [the statute's] meaning, and differ as to its application,' as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the Court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question. There can be no doubt that deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306 at 311, 62 S.Ct. 237 at 239, 'judicial enlargement of a criminal act by interpretation is at war with a fundamental

concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot ' be cured in a given case placing valid limits on the statute,' for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss...'... If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, ... making it narrower and more definite than it's language indicates, it must be a fortioriso where the construction unexpectedly broadens a statute which on its face had been narrow and precise. Indeed, an unforesseable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, Section 10, of the Constitution forbids... If the state legislature is barred by the ex post facto clause from passing such a law, it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction..."

Id., U.S. at 351-54, 84 S.Ct. at 1701-02. Clearly, the District of Columbia Court of Appeals construction of Rule XI, Section 1,

was the kind of judicial expansion of a rule, narrow and precise on its face, that was condemned in Bouie because it failed to give the Petitioner the requisite notice of the reach of the disciplinary proceedings mandated by Ruffalo.

Lastly, with respect to this issue of the Board's and the District of Columbia Court of Appeal's concurring opinion appears to recognize, that that court has essentially amended D.C. Bar Rule XI by their opinion in the case at bar so as to bring within the rule's scope all "active" members of the bar regardless of whether or not they engage in the practice of law within the District of Columbia. Such a conclusion is compelled in light of the concurring opinion's call upon the court to formally amend the rule. However, it is inappropriate for the District of Columbia Court of Appeals to amend its own rule by case law when that court has adopted D.C. Bar

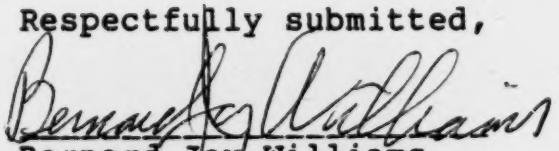
Rule XIII as the procedure by which rules of that court should be amended. Failure to follow its own established procedure in the amendment of its rules is, again, a failure to provide adequate notice to all members of the bar of changes in the rules that will effect them and which Rule XIII is designed to address. Without such notice, due process safeguards are denied thos members who allegedly violate or come within the jurisdiction of a rule that did not exist at the time of the alleged violation. For these reasons, this Court has mandated that agencies follow the procedures that they, themselves, have established. Service v. Dulles, 354 U.S. 363 at 388, 77 S.Ct. 1165 (1957). Even Congress has been held to bound to comply with regulation for its own conduct. Yellin v. United States, 374 U.S. 109 at 123-24, 83 S.Ct, 1828 at 1837 (1963). No reason exists why the District of Columbia

Court of Appeals, a creature of Congress, should not be required to do so as well.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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District of Columbia
Court of Appeals

No. 84-1161

In the Matter of
HUGH M. WADE
A Member of the Bar of the
District of Columbia
Court of Appeals

BEFORE: Pryor, Chief Judge, and Nebeker, Mack, Newman, Ferren, Belson, Terry, Rogers and Steadman, Associate Judges.

ORDER

On consideration of respondent's petitition for rehearing en banc, and it appearing that no judge of this court has called for a vote thereon, it is

ORDERED that the petitition for rehearing en banc is denied. It is

FURTHER ORDERED that the disbarment of respondent shall be effective 30 days from the date of this order.

PER CURIAM
DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED AUG 18, 1987
RICHARD B. HOFFMAN
Clerk

_____/s/_____
DEPUTY CLERK

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 84-1161

IN THE MATTER OF HUGH M. WADE, RESPONDENT.

A Member of the Bar of the
District of Columbia Court of Appeals

On Review of a Report and Recommendation
of the Board on Professional Responsibility

(Argued September 16, 1986 Decided May 29, 1987)

Clark U. Fleckinger II for respondent.

Elizabeth J. Branda, Assistant Bar Counsel, with whom *Thomas H. Henderson, Jr.*, Bar Counsel, was on the brief, for the Board on Professional Responsibility.

Before PRYOR, *Chief Judge*, and MACK and ROGERS, *Associate Judges*.

Opinion for the court by *Chief Judge* PRYOR.

Concurring opinion by *Associate Judge* ROGERS at p. 10.

PRYOR, *Chief Judge*: In this disciplinary matter, Hearing Committee Number Seven (Hearing Committee) found that respondent Hugh M. Wade had violated DR 1-102(A)(3),[1] (4),[2] and DR 9-103(B)(4)[3] by misappro-

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[1] "A lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude . . . ."

[2] "A lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[3] "A lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds, securities, or other

priating and converting to his own use money entrusted to him by a client. The Hearing Committee recommended a sanction of disbarment, and further recommended that Mr. Wade be ordered to make restitution to his client in the amount of $4,531.72.[4] The Board on Professional Responsibility (the Board) agreed with the findings and recommendations of the Hearing Committee, and recommended that respondent be disbarred.[5] Before this court, respondent asserts that the Board lacks jurisdiction in this matter and, in the alternative, that the Board's findings are unsupported by substantial evidence, and the recommended sanction of disbarment is unwarranted. We disagree with respondent's contentions, and, accordingly, we adopt the Board's recommendation.

I

The evidence against respondent before the Hearing Committee consisted of the testimony of respondent's

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properties in the possession of the lawyer which the client is entitled to receive."

[4] The Hearing Committee also found violations of DR 3-101 (B) (practicing law in a jurisdiction in violation of its regulations); DR 2-102 (A) (use of a letterhead containing false or misleading statement); DR 9-103 (A) (failure to properly preserve identity of client's funds); and DR 1-102 (A) (4), (5) ("conduct involving dishonesty, fraud, deceit, or misrepresentation" and "conduct that is prejudicial to the administration of justice" in respondent's misrepresentations to Bar Counsel that he had disbursed certain funds to his client). The Hearing Committee's recommendation of disbarment, however, was based on respondent's violations of DR 1-102 (A) (3), (4), and DR 9-103 (B) (4).

[5] Finding that the Hearing Committee's recommended order that respondent make restitution in the amount of $4,531.72 "would not . . . serve a useful purpose," the Board did not include this order in its recommended sanction.

client, supported in part by documentary evidence. Respondent's client testified that she and respondent had been romantically involved in 1975 and 1976 while both were living in Boston, Massachusetts, but that their relationship ended in 1976. While she and respondent did not share bank accounts or living quarters, they did share some expenses.

In April 1979, respondent's client's mother died, and it became respondent's client's responsibility to sell her mother's car as well as the house in which her mother had been living. Since she was about to move to North Carolina to attend graduate school, she consulted respondent concerning the money she expected to receive. Respondent agreed to handle the sale of the house and car, and suggested that his client establish a trust with the money she was to receive from the sale of the house. He refused to accept a retainer for his services, but did accept $332, allegedly for administrative expenses in setting up the trust.

At respondent's suggestion, his client transferred all her savings from her account in one Boston bank to respondent's bank also in Boston and gave him power of attorney to handle deposits and withdrawals at that bank. According to their agreement, respondent was to send his client money in North Carolina as she needed it.

When his client's mother's car was sold, respondent, in his capacity as her attorney, received $600 in proceeds which he deposited in his client's savings account. The sale took place in Massachusetts. Soon thereafter, however, respondent withdrew $500. Respondent neither sent his client the money nor expended it on her behalf. In September 1979, when she questioned respondent about the $10 balance of her account, respondent's client was

told that he deposited the money in another account that paid higher interest.

When the house in which respondent's client's mother had been living was sold, the buyer made no down payment, but agreed instead to make monthly payments on a second mortgage. The house was located in Massachusetts; the sale took place there as well. Because of this arrangement, no trust was established, and respondent, acting as her attorney, never sent his client the $500 deposit or several monthly payments on the mortgage he received.

In January and August 1980, respondent closed out his client's high interest accounts of more than $1,000 each by executing withdrawal slips in his own handwriting. When his client discovered the accounts had been closed, she asked respondent about the matter. He stated that he had changed the accounts to new accounts that yielded higher interest. Still, except for $300 respondent sent his client in 1980, his client received no money from her attorney.

In January 1981, respondent's client asked respondent to send her all of her money, and to return an insurance policy she had left with him for the purpose of changing the beneficiary. Respondent did not comply with the request and did not respond to subsequent letters seeking the return of the funds.

In January 1982, respondent's client obtained a judgment against him in Massachusetts for more than $8,000, and agreed to accept respondent's offer to pay $4,000 in settlement of the judgment. Respondent never paid his client the $4,000.

In 1983, a disciplinary proceeding was instituted against respondent based on his alleged misconduct.

II

Before reviewing the Board's Report and Recommendation, we address respondent's challenge to the disciplinary authority of the Board. Respondent contends that the Board lacks jurisdiction to proceed against him because the interplay among D.C. Code §§ 11-2501, -2502 (1981) and D.C. Bar R. XI must be interpreted by this court as meaning that the Board may only proceed against attorneys who are practicing law in the District, whether the alleged violation is related to that practice or not, and that "practicing law in the District" is not synonymous with "member of the D.C. bar."

The record reveals that all of the conduct complained of occurred in the Commonwealth of Massachusetts, that neither the complainant nor the respondent were residents of the District of Columbia, and that respondent neither maintained a law office nor actively represented clients in the District of Columbia. It is also clear that none of the property alleged to have been misappropriated by respondent was located in the District of Columbia.[6]

D.C. Code § 11-2501 (a) provides:

> The District of Columbia Court of Appeals shall make such rules as it deems proper re-

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[6] Before filing her complaint in the District of Columbia, respondent's client attempted to resolve her conflict in Massachusetts. As a result of these attempts, in 1981, the respondent entered into an agreement of Assurance and Discontinuance with the Attorney General of Massachusetts in lieu of the Attorney General commencing a civil action against him for practicing law without a license in the Commonwealth. In addition, in 1982, the Office of Bar Counsel in Massachusetts refused to pursue these allegations. As noted *supra*, respondent's client ultimately obtained a judgment against respondent and agreed to a settlement of $4,000.

specting the examination, qualification and admission of persons to membership in its bar, and their censure, suspension, and expulsion.

D.C. Code § 11-2502 provides in part:

> The District of Columbia Court of Appeals *may censure, suspend from practice, or expel a member of its bar* for crime, misdemeanor . . . . [Emphasis added.]

While these Code provisions create in the court the power to establish rules for managing its bar, it is D.C. Bar R. XI, § 1 that actually creates and defines the scope and duties associated with the disciplinary authority of this court and the Board on Professional Responsibility. Rule XI, § 1 reads in relevant part:

> Any attorny who *engages in the practice of law within the District of Columbia* as defined in Rule [49(b)(1)] of the General Rules of the Court . . . is subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility. [Emphasis added.]

Accordingly, while it may be true that this court could have created broader authority for the Board without thereby overstepping the congressionally established bounds, this court, by adopting Rule XI, limited the authority of the Board to disciplinary actions against attorneys who are "engaged in the practice of law within the District of Columbia."

The particular facts of this case require that we reject respondent's contentions. Respondent was admitted to the District of Columbia Bar on November 25, 1975, and he maintained an "active" status membership from that date to November 30, 1983. From November 30, 1983 to

March 8, 1984 and again from November 30, 1984 to December 19, 1984, respondent's membership was suspended for his failure to pay membership dues. In addition, each year for more than a decade, he timely filed registration statements as required by D.C. Bar R. II, § 2(1). Bar R. II, § 2(1) requires that every attorney who engages in the practice of law within the District of Columbia file an annual registration statement. Registration statements are not required of attorneys who are either not practicing law in the District of Columbia or who maintain an inactive membership status. By filing annual registration statements, respondent was complying with a procedure required only of those engaged in the practice of law and, thereby, maintaining his "active status" or his eligibility to engage in the practice of law. Further, it is clear that an attorney who is not engaged in the practice of law within the District of Columbia is required to "advise, in writing, the Secretary of the Bar that he desires to assume inactive status and to discontinue the practice of law." Rule II, § 2(4). The record reveals that respondent never so advised the Secretary.

We note that these reporting requirements are, at least in part, dependent upon a system of self-classification. It is the individual attorney who decides what his membership status is to be, and it is the individual attorney who takes the initiative to maintain active status. In the case before us, respondent claims he is not subject to the disciplinary authority of the Board because he is not engaged in the practice of law in the District of Columbia; yet, at the same time, respondent has complied with the requirements for those attorneys who are practicing law and, indeed, has not complied with the requirements for those attorneys who are not practicing law or who have changed status from active to inactive membership.

For this reason, we conclude that respondent for more than a decade intended to be considered or held himself out as an attorney engaged in the practice of the law. Having done so, he cannot now avoid the disciplinary authority of the Board. While we do recognize a distinction between mere eligibility to practice law in the District and actual practice of law, we note that respondent's behavior over the years, notwithstanding that he may not have had clients in the District, constitutes practicing law.

Thus, on the facts of this case and in light of respondent's continued and voluntary maintenance of active bar membership, we find that respondent is properly within the disciplinary authority of the Board as contemplated by Rule XI, § 1.

III

D.C. Bar R. XI, § 7 provides the appropriate standard for our review of the Board's Report and Recommendation:

> [T]he Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.

See also In re Smith, 403 A.2d 296, 302-03 (D.C. 1979) (substantial evidence standard).

We have reviewed the Board's findings and the record of the proceeding before the Hearing Committee. Given the ample factual record in this case, it is clear, as the Board found, that respondent "stole the money entrusted

to him by [his client], including her bank accounts, the money received from the sale of her mother's car, and the payments received by respondent on the house." Thus, the Board's findings are supported by substantial evidence.

Moreover, we conclude that the recommended sanction of disbarment is appropriate and consistent with that given for comparable misconduct in other cases. As we stated in *In re Minninberg*, 485 A.2d 149, 151-52 (D.C. 1984) (per curiam), "[m]isappropriation by an attorney of a client's (or other) funds is a most serious offense." Indeed, "such misconduct demonstrates absence of the basic qualities for membership" in the legal profession, and accordingly, "disbarment should ordinarily follow as a matter of course." *In re Quimby*, 123 U.S. App. D.C. 273, 274, 359 F.2d 257, 258 (1966). This court has repeatedly adopted the Board's recommendation of disbarment in cases involving misappropriation of funds. *See, e.g., In re Minninberg, supra*, 485 A.2d at 152 (conversion to own use of funds pledged to bank under trust agreement warranted disbarment); *In re Burton*, 472 A.2d 831 (D.C. 1984) (per curiam) (commingling and misappropriation of funds held in fiduciary capacity warranted disbarment). We agree with the Board that "[t]here is, on the record, no reason why this normal sanction of disbarment should not apply." Accordingly, it is

ORDERED that Hugh M. Wade be, and hereby is, disbarred from the practice of law in the District of Columbia effective thirty days from the date of this opinion.

So ordered.

ROGERS, *Associate Judge*, concurring: Although this opinion would constitute future notice, I write separately to indicate that I think Rule XI should be amended to incorporate the holding of this opinion. Our Rule should clearly state that a member of our Bar cannot escape disciplinary review here and retain a misleading unblemished record, notwithstanding admitted unauthorized practice elsewhere. By so amending our Rule, it would be in conformity with the disciplinary procedures in Maryland and Virginia. Rule BV1(a), MD. CODE ANN. (1986 Supp.) ("'Attorney' means any person admitted by the Court of Appeals to practice law."); Va. Sup. Ct. Rules, Part Six, Rule 6: IV, ¶ 13, 216 Va. 1143 (1976) ("'Attorney' means a member of the Virginia State Bar ....").

District of Columbia
Court of Appeals
Filed May 29, 1987

Alan I. Herman
Clerk

Appendix /s/
Deputy Clerk